

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

Guritz
119285

FILE: B-205908

DATE: August 24, 1982

MATTER OF: Ira J. Kaylin

DIGEST: An agency rented hotel accommodations costing \$81.43 a day and approved a cash per diem of \$35 for an employee on temporary duty at Honolulu, Hawaii, in April 1981. This contemplated payment of appropriated funds totaling \$116.43 to cover the employee's daily subsistence expenses was improper, since it exceeded both the \$70 locality per diem rate then established for Honolulu under 5 U.S.C. § 5702(a) and the alternate \$103 maximum actual expense rate authorized under 5 U.S.C. § 5702(d). There was no authority to exceed those statutory limitations, and the employee's travel allowances had to be retroactively reduced. In the circumstances, the reduction may be to the \$103 "actual expense" rate even though the employee did not itemize expenses.

This action is in response to a request for an advance decision from a certifying officer of the Department of the Treasury on the question of whether a supplemental travel voucher in the amount of \$188 may properly be certified for payment to Mr. Ira J. Kaylin, a departmental employee. That amount represents per diem Mr. Kaylin claims at a rate which was specified in an official travel authorization but which has been determined to be in excess of the applicable statutory limitations.

We conclude that the supplemental travel voucher may not be certified for payment.

Mr. Kaylin traveled on official business from his permanent duty station in Washington, D.C., to attend the annual meeting of the Asian Development Bank held in Honolulu, Hawaii, between April 21 and May 4, 1981. The Department contracted hotel accommodations for him in Honolulu for the 14-day meeting at a rental cost of \$1,140, i.e., at an average cost of \$81.43 per day. The Department

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also issued a written travel authorization specifying that he would be allowed a cash per diem of \$35 for each day of his stay in Honolulu; i.e., \$490 for the entire 14-day period.

After Mr. Kaylin returned to Washington following his temporary duty assignment, he submitted a travel voucher in which he claimed \$490 in per diem for his 14-day stay in Honolulu. Departmental accounting officials then determined that this amount was excessive. The officials noted that the maximum statutory subsistence expense rate for Honolulu was \$103 per day, and that the amount payable to Mr. Kaylin for his subsistence expenses during his 14-day assignment there was consequently limited to no more than \$1,442. They noted further that under the holding of our January 19, 1981 decision in Matter of Bureau of Indian Affairs, 60 Comp. Gen. 181, the \$1,140 paid by the Department for Mr. Kaylin's hotel accommodations in Honolulu would have to be included in the calculation of his allowable subsistence expenses. The resulting computation (\$1,442 minus \$1,140) produced a conclusion that he could be allowed no more than \$302 to cover the other subsistence expenses of his 14-day stay in Honolulu. He was then credited with that amount, which was \$188 less than the \$490 in per diem claimed on the voucher.

Mr. Kaylin has expressed dissatisfaction with that result and has submitted the supplemental travel voucher here in question as a means of reclaiming the \$188 disallowed on his original voucher. Essentially, he suggests that since the terms of his official travel authorization specified payment of per diem at the rate of \$35 for each day of his stay in Honolulu, or \$490 for the entire 14-day assignment, the Department of the Treasury is legally bound to pay him that amount. In addition, he suggests that the action taken to reduce his reimbursement for subsistence expenses to \$302, or \$21.57 per day, was unreasonable and inequitable, since he believes that amount was insufficient to cover the costs of his meals and other necessary subsistence expenses.

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In requesting an advance decision, the certifying officer questions whether Mr. Kaylin's \$188 claim may be allowed on the basis of his contentions in the matter.

Subsection 5702(a) of title 5, United States Code, provides that an employee while traveling on official business away from his designated post of duty is entitled to a per diem allowance for travel outside the continental United States at a rate not to exceed that established by the President, or his designee, for each locality where travel is to be performed. The locality per diem rate so established for Honolulu, Hawaii, in April and May 1981 was \$70. In addition, subsection 5702(d) of title 5 provides that an employee may be reimbursed for the actual and necessary expenses of official travel outside the continental United States when the per diem allowance would be less than these expenses, except that reimbursement on an actual expense basis may not exceed \$33 plus the locality per diem rate. Thus, in April and May 1981 reimbursement of the daily subsistence expenses of travelers on official business in Honolulu, under the alternate actual expense method authorized by 5 U.S.C. § 5702(d), could not exceed \$70 plus \$33, or \$103.

The payments authorized by 5 U.S.C. § 5702 are for the purpose of reimbursing an employee for necessary subsistence expenses incurred in the performance of official travel, including the necessary costs of lodging and meals. Normally, an employee on a temporary duty assignment is responsible for obtaining and paying for his own lodgings, and he claims reimbursement for his lodging expenses under 5 U.S.C. § 5702 when he submits his travel voucher. In Matter of Bureau of Indian Affairs, 60 Comp. Gen. 181, cited above, we said that it was also generally permissible for a contracting officer to obtain the employee's lodgings through Government contract or purchase order, since no prohibition exists to prevent that arrangement other than the restriction contained in 40 U.S.C. § 34 on the rental of space in the District of Columbia. However, we concluded that the statutory and regulatory limitations on per diem or actual expense rates were applicable to those rental agreements entered into by

agencies for lodgings, since contracting officers of the Government may not do indirectly that which a statute or regulation forbids doing directly. Hence, we held that the rental costs incurred by an agency in contracting lodgings for an employee on a temporary duty assignment must be included in the computation of the employee's monetary travel entitlements.

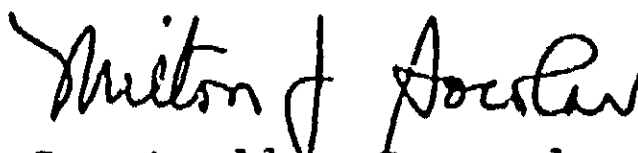
In the present case, the Department of the Treasury procured lodgings in Honolulu for Mr. Kaylin at an average daily rental rate of \$81.43 and initially authorized a cash per diem allowance at the rate of \$35 for his meals and other living expenses, so that the Department originally contemplated making expenditures from appropriated funds at an actual combined rate of \$116.43 to cover his daily subsistence expenses. In our view this was improper, since that contemplated rate exceeded both the \$70 locality per diem allowance rate then established for Honolulu under 5 U.S.C. § 5702(a) and the alternate \$103 maximum actual expense rate authorized under 5 U.S.C. § 5702(d). Although Mr. Kaylin suggests that on the basis of entries contained in his official travel authorization he should nevertheless be allowed payment at a rate in excess of the maximum rates prescribed by statute and regulation, the rule is well established that provisions of travel authorizations which conflict with statutory law and regulations are invalid. See, e.g., Matter of Willis, 59 Comp. Gen. 619, 621 (1980); Matter of Stark, B-188051, May 4, 1977; Matter of Dougherty, B-188106, March 3, 1977; and Matter of Bowman, B-185429, July 2, 1976. Further, Mr. Kaylin's belief that the maximum allowances prescribed by statute were inadequate may not serve as a basis for any payment in excess of the statutory limitations. Compare, e.g., Matter of Britt, B-164228, October 9, 1975. Hence, we conclude that he was not entitled to a cash per diem at the rate of \$35 during his 14-day stay in Honolulu, and that his claim for the additional amounts believed due may not be paid.

It appears that the concerned departmental officials initially authorized a cash per diem allowance of \$35 for Mr. Kaylin in April 1981

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because they were unaware of our January 19, 1981 decision in Matter of Bureau of Indian Affairs, and it had previously been the Department's usual policy to pay employees performing official travel one-half of the established locality per diem allowance if lodgings were contracted for them. When those officials later became aware of our decision disapproving that policy, they authorized payment to Mr. Kaylin at the maximum rate allowable under the actual subsistence expense method prescribed by 5 U.S.C. § 5702(d). Ordinarily, the use of that method must be approved in advance of travel, and the employee must itemize the necessary subsistence expenses incurred during travel. See Matter of Palmer, 56 Comp. Gen. 40 (1976). However, since a retroactive modification of the travel authorization was necessary in this case, and the amounts allowed do not appear to have been clearly excessive in the circumstances, we will not question the method used to recompute Mr. Kaylin's travel allowances even though he did not itemize his actual expenses.

Mr. Kaylin's supplemental travel voucher, which may not be paid, will be retained here.


Acting Comptroller General
of the United States